

DECISION

Introduction

This hearing dealt with the tenant's Application for Dispute Resolution under the *Residential Tenancy Act* (the "Act") for:

- cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) under sections 46 and 55 of the Act
- authorization to recover the filing fee for this application from the landlord under section 72 of the Act

Service of Notice of Dispute Resolution Proceeding (Proceeding Package)

As the Landlord acknowledged service of the Tenant's Notice of Dispute Resolution Proceeding package and did not raise any concerns regarding service, I find the Landlord was served in accordance with the Act.

As the Tenant acknowledged service of the Landlord's Notice of Dispute Resolution Proceeding Package and did not raise any concerns regarding service, I find the Tenant was served in accordance with the Act.

Service of Evidence

As the parties acknowledged receipt of each other's documentary evidence, I accepted the documentary evidence before me for consideration.

Issues to be Decided

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Is the tenant entitled to recover the filing fee for this application from the landlord?

Background and Evidence

I have reviewed all evidence, including the testimony of the parties, but will refer only to what I find relevant for my decision.

Evidence was provided showing that the monthly rent of \$3,187.25 was due on the 16th day of the month, a security deposit in the amount of \$1,575.00 and a pet damage deposit in the amount of \$1,575.00 were held by the Landlord.

On June 12 the Landlord provided the Tenant with a Two Month Notice for Landlord's Use of the Property. The Notice indicated that the Tenant must move out of the property by August 15, 2023. Although the Tenant disputed this Notice, that matter is the subject of another hearing set for Tuesday, November 21, 2023.

On July 16 the Landlord had not received a rent cheque for July from the Tenant.

On July 17 the Landlord sent a text message to the Tenant asking that he be notified when the Tenant had sent his July rent cheque. That same day, the Tenant wrote back that the Landlord could just keep the deposit for July.

The Landlord did not reply to this text message. The Tenant said that he considered the Landlord to have accepted this proposal, and that when he learned the Landlord had not in late July, he sent a rent cheque to him via regular mail. The Landlord said this was not received.

On August 9 the Landlord contacted the Tenant via text requesting confirmation that the Tenant would be moving out further to the Notice for Landlord's Use of the Property. The Tenant replied on August 15 that "If you want possession you need to go to the Residential Tenancy Branch." When the Landlord asked the Tenant to clarify whether he was moving out the Tenant responded, "When I sell some real estate in the US I'm buying a house in Kitsilano."

On August 16 the Landlord attached a 10 Day Notice for unpaid rent to the Tenant's door, claiming that he was now owed rent in the amount of \$6,394.50, or two months.

The Tenant sent the Landlord a cheque post-dated August 16 via registered mail which the Landlord then deposited.

The Tenant submitted a dispute resolution application on August 21, within the timeframe permitted.

On August 25 the Landlord was notified that the Tenant's August cheque did not clear. The Landlord provided documentation confirming this. When the Tenant learned that his cheque did not clear, he said that he sent another rent cheque to him via regular mail. The Landlord said this was not received.

The Tenant claimed that he sent another rent cheque to the Landlord for September via regular mail. The Landlord said this was not received.

Analysis

When two parties to a dispute provide equally plausible accounts of events or circumstances related to a dispute, the party making the claim has the burden to provide sufficient evidence over and above their testimony to establish their claim.

Should the landlord's 10 Day Notice be cancelled? If not, is the landlord entitled to an Order of Possession?

Section 52 of the Act states that in order to be effective, a notice to end tenancy given by a landlord must:

- be in writing
- be signed and dated by the landlord giving the notice
- give the address of the rental unit
- state the effective date of the notice
- state the grounds for ending the tenancy, and
- be in the approved (Residential Tenancy Branch) form

I have reviewed the 10 Day Notice and note that it is signed and dated by the Landlord, and that it indicates that there is unpaid rent. I find that it complies with section 52 of the Act.

Section 46 of the Act states that upon receipt of a 10 Day Notice, the tenant must, within five days, either pay the full amount of the arrears as indicated on the 10 Day Notice or dispute the 10 Day Notice by filing an Application for Dispute Resolution with the Residential Tenancy Branch. If the tenant(s) do not pay the arrears or dispute the 10 Day Notice they are conclusively presumed to have accepted the end of the tenancy under section 46(5).

I find that the 10 Day Notice was attached to the Tenant's door on August 16. I find that the tenant was served effective August 19, and that the tenant had until August 24, to dispute the 10 Day Notice or to pay the full amount of the arrears. The Tenant submitted a dispute resolution application on August 21, within the timeframe permitted.

The Landlord contends that they did not receive the last three months' rent from the Tenant, spanning July through September. The Tenant claimed that he had paid rent for each month by way of cheques sent to the Landlord by way of regular mail. The Tenant proposed that the Landlord was simply declining to cash the cheques in order to force the Tenant out of the residence.

I do not find that the Tenant's suggestion that the Landlord was declining to cash his cheques to be convincing. The Tenant admits that he did not initially provide a rent cheque for July. He did not provide anything to corroborate his contention that he sent a cheque for July. When the Landlord received a cheque post-dated August 16 from the Tenant via registered mail, he promptly deposited it only for it to be returned as cancelled for insufficient funds. The Tenant offered no explanation for this.

The parties agree that this cancelled cheque had been sent via registered mail. When it came to replacing it however, the Tenant claims to have sent the next cheque via regular mail. Again, he was unable to provide anything to corroborate his contention that he had sent a cheque. In circumstances where a Notice has been served for unpaid rent, I would expect that a Tenant would be motivated to expedite their payment, rather than send it by regular mail. I would also expect that a Tenant would be especially motivated to corroborate his payment attempts, if in fact they were made. The Tenant did not take either of these actions.

I find, on a balance of probabilities, that the Tenant did not mail cheques to the Landlord as claimed. I reject the notion that the Landlord was declining to cash the cheques and note that he promptly deposited the cheque he received in August. I have determined that the Landlord is owed three months' rent for the period July through September 2023.

For the above reasons, the tenant's application for cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) under sections 46 and 55 of the Act is dismissed, without leave to reapply.

Is the landlord entitled to an Order of Possession based on a Notice to End Tenancy?

Section 55(1) of the Act states that if a tenant makes an application to set aside a landlord's notice to end a tenancy and the application is dismissed, the Arbitrator must grant the landlord an order of possession if the notice complies with section 52 of the Act. I find that the Notice complies with section 52 of the Act.

Therefore, I find that the landlord is entitled to an Order of Possession.

Is the landlord entitled to a Monetary Order for unpaid rent?

Section 55(1.1) of the Act states that if a tenant makes an application to set aside a landlord's notice to end a tenancy under section 46 of the Act for non-payment of rent, and the application is dismissed, the Arbitrator must grant the landlord an order requiring the repayment of the unpaid rent if the notice complies with section 52 of the Act. I find that the Notice complies with section 52 of the Act.

Therefore, I find the landlord is entitled to a Monetary Order for unpaid rent in the amount of \$9,561.75. This amount is calculated as follows:

July	\$3,187.25
August	\$3,187.25
September	<u>\$3,187.25</u>
Total	\$9,561.75

The Landlord continues to hold the tenant's security deposit of \$1,575.00 in trust. In accordance with the off-setting provisions of section 72 of the Act, I order the Landlord to retain the Tenant's security deposit in partial satisfaction of the monetary orders.

Is the tenant entitled to recover the filing fee for this application from the landlord?

As the tenant was not successful in this application, the tenant's application for authorization to recover the filing fee for this application from the landlord under section 72 of the Act is dismissed, without leave to reapply.

Conclusion

I grant an Order of Possession to the landlord **effective two (2) days after service of this Order on the tenants**. Should the tenants or anyone on the premises fail to comply with this Order, this Order may be filed and enforced as an Order of the Supreme Court of British Columbia.

I grant the landlord a Monetary Order in the amount of **\$7,986.75** under the following terms:

Monetary Issue	Granted Amount
a Monetary Order for unpaid rent under section 55 of the Act	\$9,561.75
Security Deposit	\$1,575.00
Total Amount	\$7,986.75

The landlord is provided with this Order in the above terms and the tenants must be served with **this Order** as soon as possible. Should the tenants fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The tenant's application for cancellation of the landlord's 10 Day Notice to End Tenancy for Unpaid Rent (the 10 Day Notice) under sections 46 and 55 of the Act is dismissed, without leave to reapply.

The tenant's application for authorization to recover the filing fee for this application from the landlord under section 72 of the Act is dismissed, without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under section 9.1(1) of the Act.

Dated: October 18, 2023



D. Armstrong, Arbitrator
Residential Tenancy Branch